Botly Securities Sdn Bhd v Chiew Joo Hwa

HIGH COURT (IPOH) — CIVIL SUIT NO 22–205 OF 1998
BALIA YUSOFF J
24 NOVEMBER 2004

Securities — Shares — Sale and purchase — Contra losses — Claim for contra losses — Agreement to transfer one party's contra losses from margin account to another margin account — Whether consent and acquiescence given to effect such transfer

The defendant and her husband ('Tay Ben Chuan') had separate margin accounts with the plaintiff, a firm of stockbroker. Both the defendant and Tay Ben Chuan had earlier wrote to the plaintiff separately agreeing for the transfer of contra losses amounting to RM1.4 million from Tay Ben Chuan's margin account to the defendant's margin account. Evidence revealed that there were heavy transactions involving the defendant's account. In the course of their dealings, the plaintiff had set off Tay Ben Chuan's contra losses with them against the defendant's margin account. The plaintiff gave evidence that transactions were carried out using the margin account of the defendant which resulted in a debit balance of RM3,546,559.82 outstanding in the defendant's margin account, and thus the claim against the defendant. The defendant denied the transactions and stated that she never gave any authority to anyone to carry out trading in shares using her margin account. She claimed the transactions in her account were manipulated by SP6, a dealer's representative in the plaintiff's firm and Tay Ben Chuan's remisier.

Held, allowing the plaintiff's claim with costs:

(1) From the evidence adduced by both parties, it was an irresistible conclusion that the defendant has consented and acquiesced for the transactions to be carried out using her account by her husband, who in turn dealt with SP6 a dealer's representative in the plaintiff's firm and her husband's remisier. The evidence of this fact was simply overwhelming and the court held that the defence put up by the defendant which took the form of a denial of the whole transaction, had no merit at all (see para 7).

(2) It appeared to be a very clear case of the defendant giving Tay Ben Chuan a free hand in dealing with her margin account which started from the very first time when an account was opened on the recommendation of the husband. From then on, the defendant agreed for the transfer of the husband's losses to her account. Shares were heavily traded using her account and through the various documents produced the defendant applied for an increase in her margin financing which finally stands at RM4.25 million. The defendant had full knowledge of what was going on with her margin account with the plaintiff, and it was certainly too late in the day now for her to plead innocence or ignorance of the whole

matter involving her account. She entered into the contractual relationship with the plaintiff with her eyes wide open and even if she claimed that the account has been manipulated by SP6 who did all the dealings with her husband, she could not deny liability to the plaintiff as evinced by the facts and circumstances of this case (see para 10).

[**Bahasa Malaysia summary**

Defendan dan suaminya ('Tay Ben Chuan') mempunyai akaun margin yang berasingan dengan plaintif, satu firma broker saham. Defendan dan Tay Ben Chuan telah terdahulunya menulis kepada plaintif secara berasingan bersetuju untuk memindahkan kerugian kontra sebanyak RM1.4 juta dari akaun margin Tay Ben Chuan ke dalam akaun margin defendan. Keterangan menunjukkan bahawa terdapat banyak urus niaga melibatkan akaun defendan. Dalam urusan-urusan mereka, plaintif telah menolak kerugian kontra Tay Ben Chuan dari akaun margin defendan. Plaintif memberi keterangan bahawa urus niaga tersebut dijalankan menggunakan akaun margin defendan yang menyebabkan baki debit sebanyak RM3,546,559.82 belum bayar di dalam akaun margin defendan, dan kemudiannya menyebabkan tuntutan ini terhadap defendan. Defendan menafikan urus niaga tersebut dan menyatakan bahawa beliau tidak pernah memberi kuasa kepada sesiapa untuk menjalan urus niaga jual beli saham menggunakan akaun marginnya. Beliau mendakwa bahawa urus niaga di dalam akaunnya telah dimanipulasikan oleh SP6, wakil peniaga dalam firma plaintif dan remiser Tay Ben Chuan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dari keterangan yang dimajukan oleh kedua-dua belah pihak, terdapat kesimpulan yang tidak dapat dibendung yang bahawa defendan bersetuju dan akur dengan urus niaga tersebut dijalankan melalui akaunnya oleh suami beliau, yang kemudiannya berurusan dengan SP6 wakil peniaga firma plaintif dan remiser suaminya. Keterangan mengenai fakta ini terlalu banyak dan mahkamah memutuskan bahawa pembelaan yang dibangkitkan oleh defendan yang merupakan satu penafian mengenai urus niaga tersebut, tidak langsung mempunyai sebarang merit (lihat perenggan 7).

(2) Ianya jelas menunjukkan bahawa defendan memberikan Tay Ben Chuan kebebasan berurusan menggunakan akaun margin beliau yang bermula dari kali pertama akaun tersebut dibuka atas perakuan suaminya. Kemudian dari itu, defendan bersetuju untuk memindah kerugian suaminya ke dalam akaun beliau. Saham-saham banyak diurusniagakan melalui akaun beliau dan melalui berbagai dokumen-dokumen yang dikemukakan defendan telah memohon untuk menambah pembiayaan margin yang akhirnya mencapai RM4.25 juta. Defendan mempunyai pengetahuan penuh mengenai apa yang berlaku di dalam akuan beliau dengan plaintif, dan ianya sudah

terlewat bagi beliau untuk merayu tidak bersalah atau tidak mengetahui mengenai perkara-perkara yang melibatkan akaunnya. Beliau telah memasuki satu perhubungan kontrak dengan plaintif dengan mata terbuka dan walaupun beliau menyatakan bahawa akaun tersebut telah dimanipulasikan oleh SP6 yang mengendalikan segala urusan-urusan dengan suaminya, beliau tidak dapat menafikan liabiliti terhadap plaintif kerana telah dibuktikan pada fakta-fakta dan keadaan-keadaan kes ini (lihat perenggan 10).]

Notes

For cases on sale of shares, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 902–913.

Cases referred to

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640 (refd)
Ismail bin Savoosah & Ors v Hajee Ismail (1889) 4 KY 453 (refd)
Subramaniam v Ratnem [1966] 1 MLJ 172 (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)

MO Lai (Joan Chong Lee Yong with him) (Tan Hock Chuan & Co) for the plaintiff.
Chuah Chong Ewe (Syarikat Ng & Anuar) for the defendant.

Balia Yusoff J:

[1] The plaintiff, a firm of stockbrokers filed an action against the defendant claiming for a sum of RM3,698,973.23 in respect of contra losses and interest at the rate of 16.5% per annum on the amount of the principle debt of RM3,546,559.82 from 9 April 1998 to the date of realisation and costs.

[2] The defendant opened a margin account with the plaintiff on 1 April 1997 when she executed the application for opening of individual account form (pp 2–54 of encl 27). By a letter dated 2 April 1997, the plaintiff granted to the defendant a margin financing facility of RM2,000,000 (pp 6–10 of encl 27) and a margin trading facility agreement dated 27 May 1997 was duly executed between the plaintiff and the defendant (pp 11–68 of encl 27). These documents are admitted and agreed by both parties to the suit as an agreed bundle of documents. At the material time, the defendant's home address was given as No 27, Tingkat Riang, Taman Riang, 12300 Penang and the address of her employer Wistana Properties was given as Suite 15–05 MWE Plaza, No 8 Lebuh Farquhar 10200, Penang. The relevance of these addresses will surface in the course of this judgment. These two addresses were stated in the application form above stated. Subsequently on 12 February 1998, the defendant through a requisition for updating of individual/corporate non-CDS trading account

notified the plaintiff of a change of address to that of 49–F, Pengkalan Weld 10300 Pulau Pinang.

[3] The defendant's husband, one Tay Ben Chuan is also a client of the plaintiff and maintains a separate margin account in his own name. On 12December 1997, both the defendant and her husband wrote to the plaintiff separately agreeing for the transfer of contra losses amounting to RM1.4 million from the husband's margin account to the defendant's margin account and in their respective letter, both agreed to indemnify the plaintiff against all actions, proceedings, claims, losses etc, imposed, suffered or incurred by the plaintiff in any way howsoever. In the course of their dealings, the plaintiff has set off Tay Ben Chuan's contra losses with them against the defendant's margin account. The plaintiff gave evidence that transactions were carried out using the margin account of the defendant which resulted in a debit balance of RM3,546,559.82 outstanding in the defendant's margin account, and thus the claim against the defendant.

[4] The defendant contends that she never gave any authority be it written or orally to anyone to carry out trading in shares using her margin account. However she admits giving specific authority to Chong Thean Siong (SPG), one Lee Thian Beng and her husband Tay Ben Chuan as stated in her letter of authorisation dated 1 April 1997 (p 5A III of encl 27). The defendant claims that she never ever made any request to increase her margin facility and also denies ever receiving any notification about the increase of her margin facility. Although the defendant admits signing the letter of consent agreeing to accept the contra losses amounting to RM1.4 million from her husband's margin account, she claims that the said letter was prepared by the plaintiff and that the plaintiff's agent Chong Thean Siong (SP6) told her that the transfer of the losses would only be done after the husband's margin account has been finalised. In her evidence, the defendant states that such arrangement about the transfer of losses was made by Chong Thean Siong (SP6). The defendant further states that she has never seen the letter written by her husband to the plaintiff requesting for the transfer of his contra losses amounting to RM1.4 million into her account and it was only recently during the trial that she has been shown that letter by her solicitors. In the course of the hearing, volumes of documents referred to as in pp 74–160 of encl 27, pp 161–227 and pp 281–303 of the same enclosure which form part of the agreed documents were referred to the defendant. These documents comprise of contra statements, contract notes, client movement reports and margin account reports of both the defendant and her husband Tay Ben Chuan. According to the defendant's testimony, she has never received any of these documents and even if she did, she claims that she is unable to understand them and she does not know how to read those documents.

[5] It is pertinent to look at these documents microscopically in the light of the controversy surrounding them. Pages 74–160 of encl 27 contain contra

statements and contracts notes belonging to both the defendant and her husband indicating that both of them are actively trading in shares with the plaintiff. In so far as the contract notes and contra statements of the defendant are concerned, they are all addressed to the defendant at her address known as Suite 15–05 MWE Plaza, 8 Leboh Farquhar, Penang except for three contra statements which were addressed to 49–F, Pengkalan Weld, 10300 Pulau Pinang which was given by the defendant to the plaintiff in the requisition for updating of individual/corporate non-CDS trading account dated 12 February 1998. Pages 161–227 of encl 27 contain the client movement reports of both the defendant and her husband as well as margin account report of the defendant. The defendant's margin account report bears the address of Wistana Properties, Suite 15–05 MWE Plaza, 8 Leboh Farquhar 10200 Penang. As for pp 281–303, these are margin account reports of the defendant's husband. From the evidence of SP1, Leong Chook Kuan, the assistant manager of the margin department, the documents referred to above refer to transactions which involves transfer of losses between the defendant's retail accounts No 044442 and her margin account. Those documents also relate to the transfer of losses from the defendant's husband's margin account to the plaintiff's margin account. The rest of the documents relate to the buying and selling of shares involving both the plaintiff's and her husband's account. SP1 also states that all the contract notes and contra statements were sent to the defendant, and that the margin department of the plaintiff never received any complaint from the defendant that she ever disputed the said transactions. At the same time, all documents relating to the transactions involving the defendant's husband were done likewise. The evidence of SP1 was further fortified by the evidence of SP3 and SP4 — officers from the contra department and the administration department of the plaintiff who gave evidence as to the procedure of preparing the contra statements and the contract notes, and the posting of such documents to the plaintiff's clients. SP4 in particular gave evidence to the effect that there were no returned mails from the defendant, and there were no complaints of any discrepancies by both the defendant and her husband with regard to the documents involving their share transactions. SP2, the senior officer of the contra department of the plaintiff testified that she is in charge of the documentation pertaining to updating of the client's particulars and among others refers to the updating of the defendant's address when it was changed to 49–F Pengkalan Weld, 10300 Pulau Pinang. The assistant manager of the maintenance department of the plaintiff (SP5), gave evidence that documents referred to in the agreed bundle of documents namely the contra statements, the contract notes, client movement reports and the margin account reports are documents produced by the plaintiff's computer system in the course of its ordinary use and he is the assistant manager in charge and responsible for the management of the operation of the computers in the plaintiff's company. He is also responsible for the running as well as the conduct of activities for which the computer was used. The documents contained in those pages

mentioned earlier in the agreed bundle of documents were printed by the plaintiff's computer in the course of its ordinary use. On the evidence adduced, I accordingly hold that these documents were properly admitted and accepted as evidence.

[6] The star witness of the plaintiff was that of SP6, one Chong Thean Siong, a dealer's representative. In his testimony, this witness testified that through the recommendation of her husband, the defendant opened a margin account with the plaintiff, and in so doing also signed a letter of authorisation giving him, her husband Tay Ben Chuan and one Lee Thian Beng as her representative to carry out all the functions in her name and on her behalf. Tay Ben Chuan informed SP6 that he wished to trade by using his wife's name because his margin facility with the plaintiff had reached its limit. From day one, Tay Ben Chuan has been giving instructions to SP6 to carry out all the share transactions in the defendant's margin account and there has never been any complaints from the defendant regarding the same. Confirmation of sales and purchase were made via facsimile transmissions messages between him and Tay Ben Chuan using the defendant's margin account as evident from pp 239–280 of the agreed bundle of documents. At the same time, contra statements and contract notes were also sent to the defendant. This witness also stated that prior to the forced selling of the shares in the defendant's account, the said Tay Ben Chuan had proposed a global settlement which involve both his own margin account and the defendant's margin account with the plaintiff. As a result of these numerous transactions, the margin account of the defendant showed a shortfall of RM1,307,000.76 and on 16 December 1997, a 'margin call' was issued to the defendant. The defendant failed to respond to this as a result of which all the shares placed as securities in her margin account were sold by the plaintiff in accordance with the margin trading facility agreement. However there is still a debit balance of RM3,546,559.82 and the margin facility was finally revoked on 23 January 1998. Interest amounting to RM152,413.41 were added on to this figure as up to 8 April 1998 giving rise to the plaintiff's claim of RM3,698,973.23.

[7] From the evidence adduced by both parties, it is established and leads me to the irresistible conclusion that the defendant has consented and acquiesced for the transactions to be carried out using her account by her husband, who in turn deals with Chong Thean Siong (SP6) a dealer's representative in the plaintiff's firm and her husband's remisier. The evidence of this fact is simply overwhelming and I cannot help but hold that the defence put up by the defendant which takes the form of a denial of the whole transaction, has no merit at all. The evidence presented both oral and documentary supports the plaintiff's claim to the hilt. From the evidence led, it is an undisputed fact that this is simply a case of a wife giving her husband a carte blanche to act for her in respect of the margin account. It is in her evidence that the margin account was opened in her name on the recommendation of her husband. The defendant

also admits that she opened the account to enable her to do more trading in shares. There is certainly ample evidence of voluminous trading in her account but at the same time the defendant claims that she only trade when she received tips, and categorically she mentions that she only traded in two lots of shares by asking her husband to call the remisier to effect the transactions. Having scrutinized the defendant's evidence, I find that her evidence is fraught with improbabilities and plain denials. It is certainly too late in the day for the defendant to come to court and claim that she is not bound by the various documents which she had signed. In *Subramaniam v Ratnem* [1966] 1 MLJ 172, Gill J (as he then was) referred to a passage in the judgment of Wood Ag CJ in *Ismail bin Savoosah & Ors v Hajee Ismail*(1889) 4 KY 453 at p 458 wherein it was stated:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common law principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained.

[8] During cross-examination by the plaintiff's counsel, the defendant claims that she understands only a bit of English and the documents she signed were filled in by the remisier. She only understands a bit of those documents. I have observed her performance in court, and I have also noted throughout the trial that she has been following and listening intently to the proceedings which are all in the English language, and at one instance during her testimony, I did remind her not to be evasive and 'acting' when she claims she does not know what she signed. This situation arises when I observed that that the defendant was interacting with the court's interpreter. From my observation the defendant does understand some English. The defendant never denied that she signed those documents nor does she dispute the content. She is bound by what she has signed and agreed. In her evidence she claims she does not know what she signed and she does not even know what P3 and P5 were for, which are applications for an increase for margin financing and she merely said that those documents were signed at the request of her husband. In this respect, I find it enlightening a passage from the judgment of James Foong J in the case of *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 at p 643 wherein after considering the line of authorities on the doctrine of *non est factum*, His Lordship states:

> I find the aforesaid authorities laid down sound principles of law on persons executing blank documents. A person who choose to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and he is prevented from denying the contents therein do not bind him.

[9] Sieving through the facts of this case, I am reminded of a passage in the judgment of Gopal Sri Ram JCA in the case of *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 on the conduct of a housewife in a share trading transaction which went bad. In that case the husband entered into a contract to deal in stocks by using the wife's name in order to evade the effect of a Mareva injunction against him. The wife opened a bank account with a cheque book and signed all the cheque in blank and handed the whole cheque book to her husband. All the transactions were done in her name as it was the name which appeared on the contract notes. When the share account went bad, the company sued the wife for the money owing to it. The application for summary judgment against the wife was granted and on appeal to the Court of Appeal at p 706, the court said:

> This is the case where the wife, by her acting would have led a reasonable man to believe that she had given her husband a carte blanche to act on her behalf. The undisputed facts reasonably support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. She cannot therefore now assert facts that would contradict her earlier conduct. That would be inequitable and therefore unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan. If it were otherwise, it would amount to our letting her off the hook for assisting in the intentional breach of an order of court. That would in our judgment, amount to condoning an attempt to subvert the machinery of justice. We will not tolerate such a result.

[10] Similarly, in the case of the defendant in this case, it appears to be a very clear case of her giving the husband a free hand in dealing with her margin account which started from the very fist time when an account was opened on the recommendation of the husband. From then on, the defendant agreed for the transfer of the husband's losses to her account. Shares were heavily traded using her account and through the various documents produced as exhs P3, P4 and P5 the defendant applied for an increase in her margin financing which finally stands at RM4.25 million. The defendant has full knowledge of what was going on with her margin account with the plaintiff, and it is certainly too late in the day now for her to plead innocence or ignorance of the whole matter involving her account. It is too far fetched for any reasonable man to believe her version of the transaction. She entered into the contractual relationship with the plaintiff with her eyes wide open and even if she claims that the account has been manipulated by Chong Thean Siong (SP6) the remisier who does all the dealings with her husband, she could not deny liability to the plaintiff as evinced by the facts and circumstances of this case.

[11] In the circumstances, I gave judgment for the plaintiff's claim of RM3,698,973.23 with costs. With regard to interest the plaintiff has earlier applied by way of an oral amendment to the pleading in encl 38 by adding a new prayer claiming for interest at 8% per annum on the judgment sum from the date of judgment till the date of final settlement, to which the defendant has no objection. I accordingly allowed the application and order that interest

be allowed in those terms to the plaintiff. In respect of the plaintiff's claims for an interest at the rate of 16.5% per annum on the amount of the principal sum of RM3,546,559.82 from 9 April 1998 to the date of realisation, by the plaintiff's counsel own admission of the lack of evidence to that effect, such claim is therefore disallowed.

Plaintiff's claim allowed in part.

Reported by Loo Lai Mee